Nos. 87-712 and 87-929

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.,

Petitioners,

— against —

COMMONWEALTH OF MASSACHUSETTS,

Respondent.

COMMONWEALTH OF MASSACHUSETTS,

Cross-Petitioner,

— against —

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.,

Cross-Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF THE STATE OF NEW YORK AS *AMICUS CURIAE* IN SUPPORT OF THE COMMONWEALTH OF MASSACHUSETTS

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INTEREST OF *AMICUS CURIAE*

New York is one of the largest participants in the Medicaid program, a cooperative federal-state program which provides payments for medical assistance and services for the medically needy. 42 U.S.C. §§ 1396 *et seq.* (1982). Participation by the State entitles it to reimbursement by the federal government for a percentage of the medical costs incurred by qualified recipients.

On occasion, however, the Department of Health and Human Services disallows reimbursement for particular categories of expenditure. With increasing frequency, the effect of these administrative determinations has been to establish federal policy with respect to on-going programs, as well as to withhold specific funds which would otherwise be forthcoming. The impact of these decisions on the benefit level and the nature of the programs available to New York's medically needy is significant. New York submits this brief because of its concern that if this Court does not recognize the jurisdiction of the district courts to hear cases challenging disallowance determinations, the states will be relegated to a forum which cannot provide the complete relief necessary.

SUMMARY OF ARGUMENT

The action brought by Massachusetts in this case seeks to review and set aside a final administrative determination as contrary to the Medicaid statute, Title XIX of the Social Security Act, 42 U.S.C. §§ 1396-1396q. (1982 & Supp. III 1985). The relief requested is injunctive and declaratory in nature. The issues presented and the way in which they arose are therefore readily, if not classically, comprehended by the Administrative Procedure Act, 5 U.S.C. § 702 *et seq.* (1982 & Supp. IV 1986) ("APA"). If the complaint sought only prospective relief, the application of that statute would not be in issue, and the Secretary of Health and Human Services ("Secretary") concedes as much. Pet. Br. at 15 n.11, 37. However, the Secretary contends that, because a decision favorable to Massachusetts will effectively require payment of money by the federal government, the Tucker Act, 28 U.S.C. § 1491 (1982), is called into play and deprives the district court of jurisdiction to grant any form of relief.

In urging that all actions which include a Tucker Act claim must be brought in the Claims Court, a court which all parties agree cannot provide complete relief, Pet. Br. at 44, 45, the Secretary seeks adoption of a *per se* rule that is contrary to both the language and the purpose of the APA. In addition, because the payment of money lies at the heart of the Medicaid statute and other grant-in-aid programs, adoption of a rule foreclosing district court review in this case would have two far-reaching detrimental effects. It would shift to the Claims Court a broad

range of cases affecting important social policies and programs which historically have not been tried in that court. It would also effectively insulate the officials who administer these programs from the sanctions of specific relief and thereby deprive the states of the means to ensure full compliance by the Secretary with federal law. Indeed, to the extent that the issues addressed by the Secretary in disallowance proceedings overlap with those involved in compliance proceedings which are reviewed by the courts of appeals, the rule proposed by the Secretary would permit him to manipulate jurisdiction for the purpose of avoiding the imposition of specific remedies. Absent clear evidence that Congress intended to accomplish these results, this Court should not deny the district courts jurisdiction to consider claims like those presented by this case. The Secretary has not produced such evidence.[1]

POINT I

THE DISTRICT COURTS HAVE JURISDICTION UNDER 28 U.S.C. § 1331 AND 5 U.S.C. § 702 TO DECIDE CLAIMS FOR PROSPECTIVE RELIEF IN CASES CHALLENGING THE DISALLOWANCE OF FEDERAL FUNDS BY THE GRANT APPEALS BOARD AND TO REQUIRE COMPLIANCE WITH THEIR DECISIONS

Those courts which have considered the question whether district courts may hear disallowance claims have held either that the entire case may be heard, including any claim for monetary relief, *see, e.g., Maryland Dep't of Human Resources v. Dep't of Health and Human Services*, 763 F.2d 1441 (D.C. Cir. 1985); *Michigan Dep't of Social Services v. Secretary of Health and Human Services*, 744 F.2d 32 (6th Cir. 1984); *Connecticut v. Heckler*, 731 F.2d 1052 (2d Cir. 1984), *aff'd*, 472 U.S. 524 (1985); *Oregon Dep't of Human Resources v. Dep't of Health*

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[1] In addition to the arguments set forth below, the State of New York generally endorses the views and opinions expressed by the States of Alabama, Alaska, Arkansas, Connecticut, Hawaii, Illinois, Louisiana, Maryland, Michigan, Oklahoma, Utah, West Virginia, and Wisconsin in their joint *amicus* brief submitted in support of the Commonwealth of Massachussetts.

and Human Services, 727 F.2d 1411 (9th Cir. 1983); *Illinois Dep't of Public Aid v. Schweiker*, 707 F.2d 273 (7th Cir. 1983); *Delaware Division of Social Services v. United States Dep't of Health and Human Services*, 665 F. Supp. 1104 (D. Del. 1987), or, like the court below, that, at least the claim for prospective relief may be decided. *See Minnesota By Noot v. Heckler*, 718 F.2d 852 (8th Cir. 1983).[2] The result reached by these courts is consistent with the presumption that review of agency action belongs in the district courts, which can provide specific relief tailored to the circumstances of each case.

In *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1965), this Court characterized the APA as a "seminal act" which "embodies the basic presumption of judicial review" to persons aggrieved by agency action, and is intended to "cover a broad spectrum of administrative actions." 387 U.S. at 140. Accordingly, its " 'generous review provisions' must be given a 'hospitable' interpretation." 387 U.S. at 141 (quoting *Shaughnessy v. Pedreiro*, 349 U.S. 48, 51 (1955)). *See also Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 670 (1986) (stressing "the strong presumption that Congress intends judicial review of administrative action" under the APA). Congress intended that such review take place in the district courts.

In furtherance of this primary purpose of the APA, Congress, in amending the statute in 1976, sought to remove an artificial barrier to district court review of agency action by eliminating the defense of sovereign immunity. The House and Senate Reports reflect a determination by Congress that:

> *As Government programs grow*, and agency activities continue to pervade every aspect of life, judicial review of the administrative actions of Government officials becomes more and more important. Only if citizens are provided with *access to judicial remedies* against Government officials and agencies will we realize a government truly under law.

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[2] In *Connecticut v. Heckler*, this Court reviewed the validity of a disallowance decision, albeit without addressing the jurisdictional issue.

H.R. Rep. No. 1656, 94th Cong., 2d Sess. 10 *reprinted in* 1976 U.S. Code Cong. & Admin. News 6121, 6130 ("1976 House Report") (emphasis supplied); S. Rep. No. 996, 94th Cong., 2d Sess. 9 (1976). Elimination of the sovereign immunity defense in "all equitable actions for specific relief," 1976 House Report at 9; Senate Report at 8, was seen as an "important step towards this goal." 1976 House Report at 10; Senate Report at 9.

Having sought in the enactment and amendment of the APA to provide "access to judicial remedies" available in the district courts, Congress could not have intended, *sub silentio*, to bar such access in the broad category of cases encompassed by the Secretary's proposed rule. This conclusion is borne out by the structure of the statute, which carefully delineates the conditions limiting its application. Section 702 provides in broad terms that persons injured by "agency action" are "entitled to judicial review thereof." However, the right to judicial review is immediately qualified by specific limitations set forth in the same provision. The action must seek relief "other than money damages." In addition, relief must be denied "if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought." If Congress had intended to preclude the district courts from granting equitable relief merely because a Tucker Act claim is included in a case, it would have adopted an additional express limitation to this effect. *See Melvin v. Laird*, 365 F. Supp. 511, 518 (E.D.N.Y. 1973) (Weinstein, J.). It did not.

The Secretary's conclusory statement that "the limitations of the APA support the view that Congress has actually forbidden claim splitting," Pet. Br. at 43, is based upon his erroneous assumption that the monetary part of this case must be heard in the Claims Court, coupled with an attempt to show that two of the APA limitations bar prospective relief. The cases in which these provisions have been applied are, for the most part, contract actions and, therefore, except for claims under $10,000, 28 U.S.C. § 1346(a)(2) (1982), not cases which Congress intended the district courts to hear when it amended the APA. *See, e.g., Sharp v. Weinberger*, 798 F.2d 1521, 1523-1524 (D.C. Cir. 1986); *North Side Lumber Co. v. Block*, 753 F.2d 1482, 1485 (9th Cir.),

cert. denied, 474 U.S. 931 (1985). Neither provision affords a basis for ousting the district courts of jurisdiction here.

A. The Claims Court cannot grant the injunctive relief which is necessary in this case. Therefore, the Tucker Act does not provide an adequate remedy that would bar district court review under Section 704 of the APA

Section 704 provides that relief is not available under the APA if an "adequate remedy" exists in another court. The Secretary contends that, although the Claims Court cannot grant injunctive or declaratory relief, Pet. Br. at 44, 45, it can grant relief which is adequate, "[a]t least in the circumstances of this case." The argument is deficient in two respects.

First, the legislative history of the provision, which was part of the statute as originally enacted in 1946, shows that it was a codification of existing law concerning ripeness and exhaustion of administrative remedies. *See* S. Rep. No. 752, 79th Cong. 1st Sess. 38, 44 (1945); Moore, The Proposed Administrative Procedure Act, *reprinted in* 92 Cong. Rec., Part 2, 2160, 2163 (1946). One contemporary finality issue related to the availability of pre-enforcement judicial review of agency action. *See, e.g., United Public Workers v. Mitchell*, 330 U.S. 75, 89-93 (1947). Section 704 was "designed" to preclude such review "where there is a subsequent and adequate remedy at law available." Bureau of National Affairs, *Administrative Procedure Act: Summary and Analysis* 34 (1946). Given this limited purpose, section 704 should not be applied to bar APA review where, as here, no issue of finality is presented. *See Commonwealth of Massachusetts v. Departmental Grant Appeals Board*, 815 F.2d 778 (1st Cir. 1987). In that case, the Court of Appeals for the First Circuit refused to apply section 704 in similar circumstances because of its reluctance to base "[its] decision concerning district court jurisdiction on a statutory provision which was written with other purposes in mind and whose authority even with regard to those

matters has been substantially qualified by subsequent judicial interpretation." 815 F.2d at 784.[3]

Even if section 704 were applicable in this case, the relief available in the Claims Court is not adequate. The relief which the Secretary posits as a substitute for an injunction and declaratory judgment consists of "a statement of the law that will bind the federal government in its future dealings with the plaintiff" and a remand to the agency with appropriate directions. Pet. Br. at 44. In the same vein, the Secretary asserts that an injunction is unnecessary in this case because "under our system of law, all judicial and administrative decisions stand as precedents for later cases [and] therefore, have some potential future effect." Pet. Br. at 40 n.34.

Notwithstanding the Secretary's assurances that *stare decisis* will protect the state, his record of refusing to follow binding judicial decisions demonstrates the need for the issuance of an enforceable decree. The Secretary's policies of nonacquiescence have been documented in the courts and in the Congress. For example, in *Stieberger v. Heckler*, 615 F. Supp. 1315 (S.D.N.Y. 1985), the court held that the nonacquiescence policies employed by the Secretary before and after 1985 were illegal and found it necessary to issue an injunction barring the Secretary, *inter alia*, from denying or terminating social security benefits under policies inconsistent with decisions of the Court of Appeals for the Second Circuit.[4] Indeed, members of this Court have had

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[3] Section 704 has been applied in a small number of cases where finality was not an issue. However, in each case, the court determined that an award of "money damages" by the Claims Court would provide adequate relief. *See, e.g., International Engineering Co. v. Richardson*, 512 F.2d 573 (D.C. Cir. 1975), *cert. denied*, 428 U.S. 1048 (1976) (complaint alleged breach of contract and sought injunctive and declaratory relief as well as damages); *Alabama Rival Fire Ins. Co. v. Taylor*, 530 F.2d 1221 (5th Cir. 1976) (action to compel specific performance of a contract). This is not such a case.

[4] On appeal, the injunction was vacated based upon representations in another case that the Secretary's policy was in fact consistent with the Court's decisions and would be implemented by appropriate directives. *Stieberger v. Bowen*, 801 F.2d 29 (2d Cir. 1986). Nearly a year later, however, the Second Circuit was still seeking evidence that the directives had been issued. *Hidalgo v. Bowen*, 822 F.2d 294, 299 (2d Cir. 1987).

occasion to criticize the Secretary's refusal to implement binding decisions of the federal courts. *See Heckler v. Lopez*, 464 U.S. 879, 887 (1983) (Brennan and Marshall, J.J., dissenting). Therefore, although the Secretary has conceded in the past that he is bound by judgments or orders in the *specific* cases in which they are issued, *Stieberger*, 615 F. Supp. at 1342, there is no reason to assume that he will comply as new cases arise.

Speculation about the risk of future disputes is not idle in the context of this case. In at least two Grant Appeals Board cases decided since the decision below, the Board has expressed its disagreement with the First Circuit's interpretation of the law and adhered to at least portions of the agency's original policy. *Utah Dep't of Health*, DGAB Dec. No. 893, August 31, 1987; *Tennessee Dep't of Health and Environment*, DGAB Dec. No. 921, December 2, 1987.[5] Only the issuance of declaratory and injunctive relief, which is not available in the Claims Court, can protect Massachusetts from any future or additional use of the Secretary's erroneous ruling in this case. *See Rowe v. United States*, 633 F.2d 799 (9th Cir. 1980), *cert. denied*, 451 U.S. 970 (1981), in which the court cited the lack of an adequate remedy in the Claims Court as a reason to bifurcate the case.

Adoption of the inflexible rule proposed by the Secretary would have an additional unwarranted result. Under existing procedures, the Secretary determines in the first instance if a dispute should be treated as a disallowance issue under 42 U.S.C. § 1316(d) (1982), or as a compliance issue under 42 U.S.C. § 1396c (1982), and, therefore, subject to review in the circuit courts. 42 U.S.C. § 1316(a)(3) (1982). Disallowances typically involve routine, isolated audit findings affecting a narrow area of reimbursement. *See, e.g., New Jersey v. Dep't of Health & Human Services*, 670 F.2d 1300, 1303 (3d Cir. 1982) (Secretary "merely refused to credit the State for expenses incurred for a limited period of time at a single nursing home").

[5] Copies of these decisions have been lodged with the Clerk of the Court.

Increasingly, however, as in the instant case, the Secretary has resorted to policy-based disallowances which affect the administration of public benefit programs. These disallowances relate to a wide range of issues and involve substantial amounts of federal financial participation. For example, New York has received decisions disallowing reimbursement under the Medicaid statute for the cost of training related to the development of its Welfare Management System based upon a regulation which changed the reimbursement rate provided by statute. If all such cases must be heard in the Claims Court, as the Secretary contends, by choosing to use the disallowance procedure, the Secretary could avoid the imposition of specific remedies in precisely those cases where they are most important.[6]

The Secretary's characterization of these cases as merely involving "a stream of money over time," Pet. Br. at 44, should not be permitted to obscure the fact that "[w]hat is at stake here is the scope of the Medicaid program, not just how many dollars Massachusetts should have received in any particular year." *Commonwealth of Massachusetts v. Secretary of Health and Human Services*, 816 F.2d 796, 799 (1st Cir. 1987), Pet. App. at 5a. The Secretary has conceded as much in the context of this case. Pet. Br. at 15, n.11, 37. Therefore, this is not a case in which the state has appended a request for specific relief simply as a device to obtain district court review. Pet. Br. at 39.

The Secretary's fear that future plaintiffs will make sham requests for injunctive relief is, in any event, unpersuasive as a reason to deny district court jurisdiction in these cases. The courts are capable of screening out such requests as part of their routine, threshold examination of the jurisdictional issues in particular cases. *See, e.g., Sharp v. Weinberger*, 798 F.2d 1521 (D.C. Cir. 1986) (Scalia, J.); *Hahn v. United States*, 757 F.2d 581, 589 (3d Cir. 1985); *Minnesota By Noot v. Heckler*, 718 F.2d 852, 859, n.12 (8th Cir. 1983).

[6] This is especially true in circuits which rely upon the Secretary's characterization of the dispute in determining jurisdiction. *See, e.g., Illinois Dep't of Public Aid v. Schweiker*, 707 F.2d 273, 278 (7th Cir. 1983) (adopting Secretary's characterization for purposes of determining the respective jurisdiction of the district courts and court of appeals).

B. The Tucker Act does not impliedly forbid the granting of equitable relief in this case

When it eliminated the defense of sovereign immunity under the APA, Congress also amended section 702 to bar relief where another statute expressly or impliedly bars the award of such relief. The purpose of the provision was to avoid making inadvertent changes in the existing pattern of statutory remedies against the United States, notably the Tucker Act and the Federal Tort Claims Act. 1976 House Report at 13; Cramton, *Nonstatutory Review of Federal Administrative Action: The Need for Statutory Reform of Sovereign Immunity, Subject Matter Jurisdiction, and Parties Defendant*, 68 Mich. L. Rev. 387, 434-435 (1970) ("Cramton").

In seeking to preserve the pre-existing statutory framework, however, Congress made it equally clear that the proviso "does not withdraw specific relief in any situation in which it is now available." 1976 House Report at 13. The legislative history therefore demonstrates that the proviso was not intended to oust the district courts of jurisdiction to grant specific relief in cases in which they had traditionally asserted their equitable powers.

Grant-in-aid cases were among those specifically recognized by Congress, when it amended section 702, as cases properly brought in the district courts. *Id.* at 9. Congress was aware of the fact that such actions often involve disputes over money, as evidenced by the decisions used to illustrate the grant-in-aid reference in the legislative history. Sovereign Immunity: Hearing Before the Subcommittee on Administrative Practice and Procedure of the Committee of the Judiciary, U.S. Senate, S. 3568, 91st Cong., 2d Sess. 92, 121 (1970) ("1970 Hearing"). *See Lee County School Dist. No. 1 v. Gardner*, 263 F. Supp. 26 (D.S.C. 1967); *Dermott Special School District v. Gardner*, 278 F. Supp. 687 (E.D. Ark. 1968). There is no indication that Congress understood that such cases were subject to review under the Tucker Act in whole or in part. Therefore, the proviso contained in section 702 does not provide a basis for depriving the district courts of jurisdiction in this case.

POINT II

AN ACTION TO SET ASIDE A DISALLOWANCE DETERMINATION OF THE GRANT APPEALS BOARD IS NOT AN ACTION FOR "MONEY DAMAGES" FOR PURPOSES OF THE APA

Section 702 contains a waiver of sovereign immunity for suits in the district courts which challenge agency action and seek "relief other than money damages." The term "money damages" "normally refers to a sum of money used as compensatory relief." *Maryland Dep't of Human Resources v. Dep't of Health and Human Services*, 763 F.2d 1441, 1446 (D.C. Cir. 1985) (Bork, J.). In this case, Massachusetts does not seek compensation for a loss, but the release of funds to which it claims an entitlement under the Medicaid statute. In contrast to an ordinary damage award, a decision favorable to the State will not result in payment of a discrete sum, but merely in a bookkeeping transaction with the federal government.

The Secretary does not deny the difference but, like the Court below, assumes that the term "money damages" as used in section 702 includes *all* forms of monetary relief and therefore bars a state from obtaining district court review in this kind of case. Pet. Br. at 24. As shown below, the legislative history demonstrates that the Secretary's interpretation is incorrect. *Maryland Dep't of Human Resources*, 763 F.2d at 1447.

Those decisions which have given a broad interpretation to section 702 have disregarded the express use of the term "money damages" in the statute. Instead, they have relied upon the apparently interchangeable use of the terms "money damages" and "monetary relief" in the House and Senate Reports accompanying the legislation. *See, e.g, New Mexico v. Regan*, 745 F.2d 1318 (10th Cir. 1984), *cert. denied*, 471 U.S. 1065 (1985); *Commonwealth of Massachusetts v. Departmental Grant Appeals Board*, 815 F.2d 778 (1st Cir. 1987). The Court of Appeals for the First Circuit also relied upon an isolated statement from a memorandum upon which the House Report is based which explained that the proposed amendment would eliminate the

defense of sovereign immunity in "all" suits for specific relief and that " '[a]ll forms of monetary relief are excluded from the recommendation.' " *Id.* at 783. *See* 1970 Hearing, 118.[7]

The statements cited by the Court of Appeals for the First Circuit are at best ambiguous.[8] Money damages are only one form of monetary relief. Therefore, absent specific evidence to the contrary, the use of both terms is just as likely to refer only to monetary awards which compensate for injury as to other possible forms of relief involving money. *See* Cramton, 68 Mich. L. Rev. at 434, n.213 (1970) (discussing gaps in the availability of ordinary damages in contract actions under the Tucker Act and tort actions under the Federal Tort Claims Act and using the terms "money damages" and "monetary relief" interchangeably). Given this ambiguity, the juxtaposition of references to specific relief and monetary relief, which the Secretary also relies upon, Pet. Br. at 31, does not constitute such evidence because a monetary award may take the form of a specific remedy.

The District of Columbia Circuit reached exactly this conclusion in holding that the district court has jurisdiction to provide complete relief in a grant-in-aid case. *Maryland Dep't of Human Resources*, 763 F.2d at 1447-1448. The court found that legislative references to monetary relief were equivocal and concluded that "Congress intended to authorize equitable suits for specific monetary relief" as evidenced by the "sweeping declaration" in both the House and Senate Reports that "the time [has] now come to eliminate the sovereign immunity defense in *all equitable actions for specific relief* against a Federal agency."

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[7] The memorandum was prepared by Robert C. Cramton, a Professor at the University of Michigan Law School, who was a consultant to the Administrative Conference of the United States. It was submitted in support of the recommendation made by the Conference in 1970 to amend the APA. The provision recommended at that time is identical to section 702 as amended in 1976.

[8] In summary comments during the 1970 Hearing, Professor Cramton paraphrased the statement cited by the First Circuit and concluded, "Recovery of money damages, however, is excluded from the bill." 1970 Hearing, 31.

763 F.2d at 1447 (emphasis in court's opinion). As further support for this interpretation, the court cited the inclusion in both Reports of cases involving " 'administration of Federal grant-in-aid programs' " as examples of "cases in which the sovereign immunity defense had continued to pose an undesirable bar to consideration of the merits." *Id.*

Although the court recognized that actions brought in the Claims Court under the Tucker Act distinguish between "monetary relief (whether awarded as damages or not) and non-monetary relief, rather than following the more traditional common law distinction between money damages and specific relief (whether involving money or not)," 763 F.2d at 1447, it could find nothing in the legislative history to indicate that the term "money damages" as used in section 702 was intended by Congress as a "shorthand" reference to practice in the Claims Court under the Tucker Act. *Id.*[9] Instead, both the House and Senate Reports focused on the law of sovereign immunity which would be overruled by the proposed legislation, thereby suggesting that "Congress would have understood the recovery of specific monies to be specific relief in this context." The court cited in particular *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 688 (1949), which distinguished between damage actions and actions for "specific relief," including "the recovery of specific property or monies." *Id.*

The memorandum prepared by Professor Cramton on behalf of the Administrative Conference substantiates the analysis of the District of Columbia Circuit. It examines the law of sovereign immunity as developed by the decisions of this Court beginning with *Larson* and explains that the amendment of section 702 was intended to "eliminate the artificialities, uncertainties and occasional injustices of [this] case law." 1970 Hearing, 117.

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[9] The Secretary disputes this conclusion simply because the legislative history makes frequent references to the Tucker Act. Although these references show that Congress had the Tucker Act "in mind," Pet. Br. at 26, the references are to contract actions for damages and not actions for other forms of monetary relief. *See, e.g.*, 1976 House Report at 12-13; 1970 Hearing, 35, 50, 71. *See* Cramton, 68 Mich. L. Rev. at 435.

One area of uncertainty derived from the statement in *Larson* that an action may be barred by sovereign immunity "if the relief requested . . . will require affirmative action by the sovereign or the disposition of unquestionably sovereign property." 337 U.S. at 691, n.11; 1970 Hearing, 109. The uncertainty concerning whether affirmative relief was available against the sovereign was subsequently reinforced by the decision in *Dugan v. Rank*, 372 U.S. 609 (1963), which "suggest[ed] that sovereign immunity is applicable whenever 'the judgment sought would expend itself upon the public treasury.' " 1970 Hearing, 114. Professor Cramton found, however, that before *Larson*, the courts held that "where a statute imposes a clear duty upon a public officer to pay a claimant, mandatory relief is available in the federal courts." 1970 Hearing, 101.

The cases cited in support of this conclusion directed that money be paid pursuant to a mandatory injunction, *Miguel v. McCarl*, 291 U.S. 442 (1934), or mandamus, *Roberts v. United States*, 176 U.S. 221 (1900).[10] Congress was therefore aware that these remedies were a means of compelling the payment of money when it amended section 702 to eliminate the defense of sovereign immunity in cases seeking specific relief in the form of injunction or mandamus. In these circumstances, the use by Congress of the term "money damages," as distinguished from the more comprehensive term monetary relief, manifests an intention to permit the use of these specific remedies to compel the payment of money under the APA.

Further evidence of this intention is found in the response given by Professor Cramton to the argument that the proposed amendment would vest too much discretion in the judiciary:

> If the fear of improper judicial interference proves warranted, which seems unlikely, it could be met by

[10] Professor Cramton distinguished these cases from those in which the official has discretion to act and there is no "statutory duty owed to the plaintiff." 1970 Hearing, 100. *See Mine Safety Appliances Co. v. Forrestal*, 326 U.S. 371 (1945).

> a provision restricting temporary or interlocutory relief, pending a decision on the merits, in those situations in which caution is most warranted: *When the action seeks (a) to compel the payment of money by the United States* . . . .

1970 Hearing, 137 (emphasis supplied). The implication that actions seeking specific monetary relief would be available under the APA as amended could hardly be clearer.

In addition, the Cramton memorandum emphasized that the amendment was intended to remove the barrier of sovereign immunity in "suits challenging government regulatory and enforcement activity," 1970 Hearing, 120, including the "[a]dministration of federal grant-in-aid programs." 1970 Hearing, 121. The memorandum cites two decisions which support the District of Columbia Circuit's assumption that this reference included cases in which "[s]pecific relief . . . will . . . often result in the payment of money from the federal treasury," 763 F.2d at 1447, *Lee County School Dist. No. 1 v. Gardner*, 263 F. Supp. 26 (D.S.C. 1967), and *Dermott Special School District v. Gardner*, 278 F. Supp. 687 (E.D. Ark. 1968).

Both were actions to obtain federal funds which had been withheld from state programs and not merely "challenges to federal inaction or regulatory guidelines," as the Secretary suggests. Pet. Br. at 34. For example, in *Lee*, the plaintiffs sought to enjoin federal officials "from discontinuing the payment of federal funds." 263 F. Supp. at 29. The court rejected the defense of sovereign immunity on the ground that the "complaint only requests that the defendants be ordered to cease an allegedly unlawful interference with the flow of funds to which the plaintiffs are already otherwise legally entitled." 263 F. Supp. at 30. The references to the grant-in-aid cases are, therefore, compelling proof that Congress was aware that such cases are routinely brought in the district courts and that the entitlement to federal funds may be addressed by those courts.

The Secretary assumes that because certain advocates in favor of eliminating the defense of sovereign immunity proposed amendments which would have barred all forms of monetary

relief, their views were incorporated in the final amendment. The evidence is to the contrary. An example is the statement submitted by the American Bar Association in support of the amendment, which the Secretary cites as evidence that monetary relief in any form is barred. Pet. Br. at 31. That statement suggests that the proposed amendment applies "only to suits for non-monetary relief" and is intended "to make clear that not only suits for money but also substitutes for suits for money are unaffected by the proposed amendment." 1970 Hearing, 58. The explanation is gratuitous for purposes of section 702 as enacted because it was written in support of a draft amendment prepared by the Administrative Law Section of the ABA in 1969, and not the version of section 702 originally considered by Congress in 1970 and enacted in 1976. American Bar Association, Annual Report, 871 (1969). The 1969 proposal provided:

> The United States may be named as a defendant and a judgment or decree may be entered against the United States irrespective of sovereign immunity, *except that existing law concerning monetary relief or specific relief in lieu thereof shall be unaffected.*

Id. (emphasis supplied). In 1970, when the ABA endorsed the amendment of section 702 prepared by the Administrative Conference, it submitted its 1969 statement, unchanged. 1970 Hearing, 58. Therefore, it is not evidence that Congress, in adopting the limited exception for money damages proposed by the Administrative Conference, intended to exclude all forms of monetary relief from section 702.

The legislative history highlights the reason why Congress used the term "money damages" rather than the broad language proposed by the ABA or by Professor Clark Byse of the Harvard Law School, whose 1962 draft is also cited by the Secretary. Pet. Br. at 29. *See Byse, Proposed Reforms in Federal "Nonstatutory" Judicial Review: Sovereign Immunity, Indispensable Parties, Mandamus*, 75 Harv. L. Rev. 1479, 1528 (1962) (excluded requests for relief which "would compel the disbursement of funds belonging to the United States"). It lies in the fact that, in amending section 702, Congress sought not only to preserve preexisting statutory remedies but, also, to foreclose the possibility

of exposing the federal government to new damage actions. Thus, Senator Kennedy advised the Senate Judiciary Committee that the "bill does not apply to monetary damages *and will not open the United States to any further liability for such damages.*" 1970 Hearing, 2 (emphasis supplied).

Professor Cramton elaborated on this purpose, stating:

> The creation of new substantive damage claims is not within the sphere of our concern; only a latitudinarian view of "judicial review" would consider monetary relief against the United States, *primarily designed to compensate for harms done*, as part of judicial review of administrative action, which is the subject of § 10 of the APA. However that may be, the language of our proposal, which is applicable in terms only to actions "seeking relief other than money damages," indicates that sovereign immunity remains as a defense to actions seeking monetary relief. *Existing law governing money damages in tort and contract actions is left unchanged.* Thus the exceptions from liability contained in the Federal Tort Claims Act, 28 U.S.C. § 2680, such as the exclusion of most intentional torts and activities involving "a discretionary function," remain unaffected by the Committee's proposal.

1970 Hearing, 139 (emphasis supplied). *See also* 1976 House Report at 20.

The broad interpretation of section 702 urged by the Secretary is therefore contrary to the legislative history which, instead, "supports the proposition that Congress used the term 'money damages' in its ordinary signification of compensatory relief." *Maryland Dep't of Human Resources*, 763 F. 2d at 1447.[11]

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[11] Section 704 does not constitute a barrier to exercise of jurisdiction over the monetary claim for the same reason it is not a bar to granting injunctive relief. The section was intended to prevent pre-enforcement review of agency action.

CONCLUSION

The judgments of the court of appeals should be affirmed in part and reversed in part, and the cases remanded with instructions that the district court had jurisdiction to order complete relief in favor of the State.

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Respectfully submitted,

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